Supreme Court, U.S.

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No. ——— OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

IN RE: MICHAEL HARRIS WEISSER,
Petitioner

On Petition for Writ of Certiorari to the Florida Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

Question Number One: Whether a State Court of last resort has jurisdiction to disbar a citizen who is not a member of the Bar of the state in which that Court presides.

Question Number Two: Whether a State Court of last resort retains jurisdiction over a citizen to impose Bar discipline sanctions on a former member of its Bar absent a specific Order, Statute, Rule or Constitutional authority granting or reserving such jurisdiction.

Question Number Three: Does an Order from the Florida Supreme Court approving a Petition for Voluntary Uncontested Resignation from the Florida Bar put a person on reasonable notice, as the term "fair notice" has been construed under the equal protection rights of the United States Constitution, Article Fourteen, that despite the voluntary resignation from its Bar that the person could be subject to further Bar discipline and punishment?

Question Number Four: In a contempt proceeding alleging the unlicensed practice of law (which the State of Florida has defined as indirect criminal contempt), does an accused have a Constitutional Right, pursuant to the United States Constitutional Bill of Rights, Article Six, to depose adverse witnesses?

Question Number Five: Where there have been serious ethical violations and infractions committed between the prosecutor and a Referee in a Bar grievance matter, is the Court of last resort of that state obligated to make inquiry prior to accepting and incorporating the alleged tainted report as a predicate to its determination of guilt and the imposition of punishment?

Question Number Six: Whether preventing a person from working in a profession of his choice as a result of minor misconduct represents cruel and unusual punishment.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Florida Bar

Michael Harris Weisser

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Florida Supreme Court Order of May 14, 1998, 721 So.2d 1142.

Florida Supreme Court Order of December 3, 1998, not published.

Florida Supreme Court Order of May 18, 1991, not published.

JURISDICTION

The date on which the highest state court decided my case was May 14, 1998. A copy of that decision appears as Appendix A.

A timely petition for rehearing was thereafter denied on the following date: December 3, 1998, and a copy of the order denying rehearing appears at Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution

> Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.
>
> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controveries to which the United States shall be a party;—to controveries between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
>
> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.
>
> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held

in the state where the same crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States shall consist only in levying was against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained.

United States Constitution Bill of Rights, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Bill of Rights, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time or war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any crimial case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Bill of Rights, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution Bill of Right, Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of the House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

1. On May 18, 1991 (See Florida Supreme Court Order dated May 18, 1991) the undersigned resigned from the Florida Bar. Said resignation was voluntary in nature and although several charges of a minor nature had been filed against the undersigned, there had been no discovery, no hearings and no trial regarding the merits of those minor accusations.

2. The Supreme Court permitting the resignation in pertinent part said

> "The uncontested petition for resignation with leave to apply for readmission after a period of three and

one-half (3½) years is approved effective retroactive to July 8, 1988."

The Order did not direct Michael Weisser, Petitioner herein ("Petitioner") to engage in or not to engage in any acts, nor did the Order reserve jurisdiction.

3. Approximately five years after entry of the May 18, 1991 Florida Supreme Court Order the Florida Bar sought to have the Florida Supreme Court hold Petitioner in contempt of that Order, alleging that Petitioner engaged in a single act of filing a lawsuit [1] on behalf of his son in which he appeared as an attorney on his son's behalf (son being eighteen years of age at the time). And the Florida Bar sought that Petitioner be disbarred for 10 years. The Florida Supreme Court on May 8, 1998 entered an Order disbarring Petitioner for five years. (See Appendix A). This decision by the Florida Supreme Court will have a chilling effect on the citizens of the Country by subjecting them to the penalty of disbarment in the State of Florida, regardless of Constitutional Due Process and Jurisdictional protections. It is patently unfair for a Court of last resort to disbar one who is not a member of its Bar. The effect of such a decision is not designed to protect the people of its State, but to cruelly and unusually punish that individual by subsequently preventing that person from continuing in the practice of law in sister States and jurisdictions. The direct result of such a disbarment would be to subject said individual to Bar disbarment proceedings in every other jurisdiction and State to which that individual is a member and further, under the laws of "comity" existing between the States, a disbarment in Florida could have catastrophic results effectively taking away that individual's right to practice law and effectively depriving that individual the right to earn a livelihood from the practice of law.

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[1] It is uncontroverted that Petitioner was trying to recover his own funds which he expensed to repair his son's car.

4. The Florida Bar sought to proceed in the case on the theory that once a member of the Bar always a member of the Bar and that the Bar discipline rules applicable to members of the Florida Bar (See Rules Regulating the Florida Bar, Rule 3-7.6 and all subsections thereof), rather than the rules applicable to someone engaging in the unlicensed practice of law, would be applicable (See Rules Regulating the Florida Bar, Rule 10-1.1 and 10-7.2). The significant difference between these rules are that under Florida Rules, a Bar grievance proceeding is governed by the Florida Civil Rules of Procedure and guilt or innocence is determined by a preponderance of the evidence. Whereas, under the Rules applicable to prosecution for the unlicensed practice of law in Florida, the standard for determination of guilt and the procedures are governed by the Criminal Code and guilt must be established beyond a reasonable doubt to convict. See *Florida Bar vs. Kaufman*, 452 So.2d 526, wherein the Florida Supreme Court stated that the unlicensed practice of law is criminal contempt. See also *In re: Gault*, 387 U.S. 1, 30, 33 (See Rules Regulating the Florida Bar, Rule 10-7.2(a).)

5. The matter was referred by the Florida Supreme Court to Referee Arthur Taylor, a Circuit Court Judge in Dade County.

6. Prior to a trial on the merits, Petitioner filed a Motion for Partial Summary Judgment, the crux of which was that he should not be tried in the proceeding as a member of the Florida Bar due to the fact that he had voluntarily resigned from the Florida Bar some six years earlier. Petitioner also argued that he could not be in contempt of the Supreme Court Order since the Order did not reserve jurisdiction. The filing of a lawsuit and appearance on behalf of his son might be construed as a violation of the Florida Court Rules with respect to the unlicensed practice of law. However, it was not a violation of Florida Bar Rules which could be prosecuted under the Supreme Court Order of May 18, 1991.

7. In its response, the Florida Bar, conceded the undersigned was not a member of the Florida Bar at all times material to the proceeding, nevertheless it maintained that it still had a right to prosecute the case under the Florida Bar Attorney Discipline Rules, to-wit: 3-7 and the subsections therein, which specifically pertains to members of the Florida Bar and that it was not necessary for the Bar to bring an action for the unlicensed practice of law which they admitted would require a different set of rules and proofs, and further stated that they had a right to maintain the action as contempt of that Order of May 18, 1991, notwithstanding the fact that the Order did not specifically retain jurisdiction.

8. Without addressing any Constitutional violations or issues, Referee Taylor denied Petitioner's Motion for Partial Summary Judgment without comment (See Order dated September 20, 1996).

9. During the pendency of the proceeding before Referee Taylor, Petitioner noticed for deposition an adverse witness, seeking to discredit the witness, who was the only witness against Petitioner in the cause. Referee Taylor however entered a protective order and prohibited Petitioner from taking the deposition. This violated Article Six and Fourteen of the United States Constitution. Notwithstanding the fact that Referee Taylor refused to allow Petitioner to take the deposition, both Referee Taylor and the Florida Supreme Court considered an adverse affidavit prepared and filed by said witness against the Petitioner and incorporated same as a predicate basis for their decision in the cause. Petitioner believes that since the proceeding should have been for indirect criminal contempt that the matter should have been considered as a criminal proceeding or quasi-criminal proceeding which under the United States Constitution Article VI requires that the Defendant, (the Petitioner herein), be given an opportunity to depose adverse witnesses and to call adverse witnesses. See *In Re: Oliver*, 333 U.S. 257,

273, in which the Court stated in a contempt proceeding, "As a minimum the defendant has a right to examine the witnesses against him." Petitioner's rights were abridged by the Order of the Referee and further abridged by the Referee and the Florida Supreme Court then considering the affidavit of the witness.

10. Shortly thereafter a trial was held before Referee Taylor. At the trial the Florida Bar attempted to call Petitioner as a witness against himself. An objection was immediately lodged stating that under the Fifth Amendment and Fourteenth Amendment of the Constitution that a defendant could not be called to testify against himself. However, the Court made a ruling that this matter was going to be tried as a civil matter rather than a criminal matter and ordered Petitioner to testify. He further ordered that all the Rules of Civil Procedure would be utilized and that the determination of guilt would be based on civil evidentiary standards as opposed to criminal evidentiary standards. This was gross error. Not only does the United States Constitution protect one against criminal prosecution in terms of not having to testify against oneself, but further, the Florida Bar Discipline Rules themselves state that where a prosecution is for the unlicensed practice of law, it is considered indirect criminal contempt of the court. See Fla. Bar, Rule 10-7.2A. Immediately after the trial and prior to Referee Taylor rendering a decision in this cause, Petitoneir filed a Motion to Recuse Referee Taylor from further consideration of the matter alleging judicial impropriety and prejudice. Despite the fact that Florida Statute 38.10 requires a judge must recuse himself if a motion of recusal is made in good faith, the Referee denied the motion in violation of the Florida Statute, stating that, "Never mind the statute," "I make the rules as I go along."

11. A renewed Motion to Recuse was then filed and Refree Taylor likewise denied that motion. Said denial was in direct violation of Florida Statute 38.10.

12. Immediately thereafter, Petitioner filed a Petition for Writ of Prohibition with the Florida Supreme Court requesting that the Florida Supreme Court remove Referee Taylor from further consideration in the cause. However, despite the pending motion to the Florida Supreme Court to remove him for cause, Referee Taylor quickly (before the Florida Supreme Court ruled on the pending Motion to Recuse), signed a Report and Recommendation prepared by the Florida Bar which contained the following conclusions: (1) that Petitioner was subject to the Florida Bar attorney discipline rules rather than the rules applicable to the unlicensed practice of law; (2) Referee Taylor then determined that Petitioner's prior voluntary uncontested resignation from the Florida Bar should now be captioned and considered as a disciplinary resignation, notwithstanding the fact that no such connotation or finding had been made at the time that the resignation was accepted on May 18, 1991, six years earlier, and that the charges which had been pending and had been dismissed against the Petitioner would now be deemed as proven and could be used against the Petitioner; (4) Referee Taylor, without any predicate and in violation of the guidelines respecting punishment, recommended that the Petitioner be disbarred for a period of ten years for having committed the singular infraction of filing a lawsuit in his son's name to recover his own funds. This represents cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. See *Weems vs. U.S.*, 217 U.S. 349, in which this Court said that "unnecessary cruelty is forbidden by the Constitution." See also *McDonald vs. Com.*, 173 Mass. 322, 74 Am.St.Rep. 293, 53 N.E. 874. The severity of this recommended punishment also represents selective and vindictive enforcement of the law in that there is no other case either in Florida or in any other jurisdiction in which a like punishment has been meted out for what amounted to a minor infraction (In point of fact, Petitioner was seeking to recover his own funds which he had paid to fix his son's vehicle which was in a car accident.

Although he filed the case in his son's name he was the real party in interest. There was no client, no fee involved and Petitioner's sole motivation was simply to recover his own funds), and (5) Referee Taylor further made a finding of fact that when the Petitioner testified that he did not remember whether or not he had received a document three years earlier, that he was lying.

13. An appeal to the Florida Supreme Court objecting to the Report and Recommendation of Referee Taylor was timely taken.

14. While the appeal was pending, the Florida Supreme Court ordered Referee Taylor to respond to the Petition for Writ of Prohibition. Essentially the Petition for Writ of Prohibition accused Referee Taylor of corroborating with the Florida Bar and stated under oath that it was Petitioner's belief that he could not get a fair and impartial hearing in any matters that were being presented to Referee Taylor. The Petition went on further to suggest that any decisions rendered by Referee Taylor were tainted and represented fruit of a poisonous tree and should not be considered by the Supreme Court. In conclusion, the Petition for Writ of Prohibition stated that under Florida Statute 38.10 Referee Taylor was in direct violation of the Florida Statutes for removal of judges/referees.

15. In a shocking display of truly unethical conduct by both the Referee and the Florida Bar prosecutor in this matter, the Florida Bar assisted Referee Taylor in preparing a response to the Writ of Prohibition which sought his removal for his obvious prejudice in favor of the Florida Bar in this matter. Referee Taylor and Bar counsel engaged in numerous ex-parte communications and the exchange of facsimiles. Referee Taylor then filed, approximately three weeks late and without providing a copy to the Petitioner, a response to the Writ of Prohibition. Notwithstanding it was filed late and did not address the issues, the Florida Supreme Court denied Peti-

tioner's Petition for Writ of Prohibition (See Order dated February 28, 1997). Neither the Florida Bar prosecutor nor Referee Taylor has ever denied this corroboration and unethical conduct, but unfortunately, the Florida Supreme Court has not sought to inquire into Petitioner's allegations, notwithstanding the fact that Petitioner offered to provide the Supreme Court with documentary evidence to support.

Instead of the Florida Supreme Court removing Referee Taylor from the case by the granting of the Petition for Writ of Prohibition, the Florida Supreme Court instead adopted the report and recommendation of the Referee and gave it its full approval as a basis for the rendering of its decision. Unfortunately, by this decision the Florida Supreme Court is allowing the fruit of the poisonous tree to serve as a basis for its decision, a decision therefore not based on the true merits of the case but on the prejudicial report issued as a result of a corroboration between the prosecutor and the trier of fact, thus compromising the Petitioner's rights to a fair and impartial hearing as those rights are protected under the Fourteenth Amendment.

16. Shortly thereafter, while the matter was still pending and prior to the entry of a final order by the Florida Supreme Court, Petitioner filed a Motion to Dismiss for Lack of Jurisdiction (See Motion dated June 9, 1997), and further enumerating that United States Constitutional and due process rights and privileges had been compromised. Thereafter, Petitioner also filed a supplemental Motion to Dismiss for Lack of Jurisdiction (See Response dated June 20, 1997). The Florida Bar filed a response to the motion (See Response dated June 27, 1997) and Petitioner filed a reply to said response (See Reply dated July 3, 1997). The Florida Supreme Court denied Petitioner's Motion to Dismiss for lack of jurisdiction (See Order dated July 3, 1997).

17. On the 14th day of May, 1998, the Florida Supreme Court entered an Order of Disbarment wherein it

stated that it had jurisdiction to disbar a non-member of the Florida Bar and that it could apply the Rules applicable to the discipline of members of the Florida Bar in reaching that determination. It further held the Petitioner guilty of contempt of its Order of May 18, 1991, but did not enumerate the basis for those conclusions. In reaching its conclusions the Supreme Court of Florida relied principally upon the findings of fact made by Referee Taylor and also referenced the affidavit of the witness of whom Referee Taylor had prohibited the Petitioner from deposing.

18. In adopting the findings of the Referee by the Florida Supreme Court, the Court effectively changed the significance and the connotation of Petitioner's former voluntary uncontested resignation from the Florida Bar on May 18, 1991, and instead, cloaked it with the onerous connotation that it was a disciplinary resignation, bringing with it the suggestion that the previously pending minor charges which had been dismissed in 1991 should now be considered as violations and convictions against the Petitioner. Such negative connotations violate all of the basic Constitutional protections of due process, fair disclosure and the like, and in essence the application of this connotation represents an expo facto application of the law. It totally ignores the facts of the case and is also contrary to the Florida Supreme Court's own decision on the issue of voluntary resignation from the Bar as enumerated in the case of *Florida Bar vs. Bennett,* 485 So.2d 1271. The Court ruled that:

> "An attorney who is not accused of conduct involving moral turpitude may be given leave to resign State Bar membership pending disciplinary proceedings without such resignation being deemed to be an admission of any allegations."

This represents a grievous breach of the Petitioner's Constitutional rights to due process, fair notice and a trial on the merits.

19. Motions for Reconsideration (See Motions for Reconsideration filed June 8, 1998, and June 23, 1998) and a Motion for Rehearing (See Motion for Rehearing filed June 8, 1998) and a Supplemental Motion for Reconsideration (See Supplemental Motion for Reconsideration filed June 23, 1998) were timely filed with the Florida Supreme Court. The Motion for Rehearing and Reconsideration was denied by the Florida Supreme Court per curiam on December 3, 1998 (See Order dated December 3, 1998).

20. The Florida Supreme Court as a direct result of its ruling in this cause has created an entirely new precedent and theory of law, to wit: the Supreme Court of Florida has adopted the position that it has an inherent right and power to discipline a non-attorney and non-member of its Bar as an attorney and to mete out discipline to that individual, as though that individual was in fact a member of the Florida Bar. That decision is not supported and has not been adopted as reflected in the reported case law in any other jurisdiction, state or territory of the United States. It therefore conflicts with the law applicable to Bar discipline of non-members of the Bar in every other jurisdiction in the United States. Further, the stance is violative of the fair notice and due process guarantees of the United States Constitution and Bill of Rights.

21. With respect to the due process and fair notice guarantees of the United States Constitution and the Bill of Rights, this Court addressed those issues in the case of *In Re Ruffalo*, 390 U.S. 544. Although not totally analogous to the present case, the Court determined that the Petitioner had been deprived of procedural due process by reason of a lack of notice. In the *Ruffalo* case, Mr. Ruffalo was not on notice that the State Bar would consider utilizing the testimony it was eliciting in a Bar proceeding as further evidence against him and to seek to use that testimony is an enitrely new count warranting dis-

barment. Likewise, Petitioner's voluntary resignation from the Florida Bar with no caveats attached thereto lacked procedural due process and lacked fair notice as there was nothing in the Florida Supreme Court's Order of May 18, 1991 to suggest that Petitioner could be subject to any further Bar discipline, as that term is applied to members of the Bar. Further, by compelling the Petitioner to testify and then utilizing that testimony as a basis for imposing a ten year debarment, Petitioner has been deprived as Ruffalo was deprived of fair notice and opportunity to defend. Petitioner would also cite to this Court *Selling vs. Radford,* 243 U.S. 46. In that Bar proceeding the United States Supreme Court determined that there must be fairness, there must be due process and where fairness and due process are lacking a disbarment is not justified. In the present matter the predicate underlying report of the Referee is highly suspect and carries with it a taint of unfairness and impropriety. It follows that the fruit of the poison apple, to-wit: the acceptance of the report of the Referee by the Florida Supreme Court as the predicate basis for its disbarment decision is likewise tainted.

22. As a direct and proximate result of the ruling by the Florida Supreme Court disbarring Petitioner herein, Petitioner has and is being deprived of his ability to work and earn a livelihood in his chosen profession for a period of five years. He is being deprived of his right to work, which right is protected by the United States Constitution. Further, that decision is grievously unjust as has been previously enumerated herein and contravenes the due process and equal protection rights of the United States clause of the Fourteenth Amendment to the United States Constitution. See *Dent v. West Virginia,* 129 U.S. 114. This Court has stated in the case of *Schware v. Board of Bar Examiners,* 354 U.S. 232,

> "A state cannot exclude a person from the practice of law or any other occupation in a manner or for

> reasons that contravene the due process clause of the Fourteenth Amendment,"

citing pages 238 and 239, but that is precisely what the Supreme Court of Florida has done in this cause and such decision should and must be overturned.

REASONS FOR GRANTING THE PETITION

1. That this case presents a novel issue in that a State Court of last resort is attempting to apply Bar Discipline Rules which are applicable to members of that State's Bar to a layman not a member of that Bar.

2. Furthermore, the Florida Supreme Court decision of disbarring one who is not a member of its Bar is in conflict with the case law of every other State and territory of these United States. There is no other case reported in any other jurisdiction where a State or territorial Court of last resort has ever entered an order to disbar a person who is not a member of their Bar.

3. That predicated upon the Order of the Florida Supreme Court dated May 18, 1991, the Petitioner and any other person who voluntarily resigned from the Florida Bar under a similarly worded resignation order could not foresee and were not put on reasonable notice that they would be subject to further Bar attorney discipline in the State of Florida.

4. That the punishment meted out by the Florida Supreme Court represents cruel and unusual punishment and far exceeds the alleged crime and that the guidelines used to establish the punishment are seriously inconistent and represent selective and vindictive enforcement of the law.

5. If allowed to stand, the Florida Supreme Court decision places anyone whether a member of a Bar or otherwise who appears in its Courts, either representing a plaintiff or a defendant, to be subject to being disciplined as a member of the Florida Bar and subjected to Florida

Bar Discipline Rules which would be applicable to a member of the Florida Bar and to possible disbarment in Florida, notwithstanding that said person is not a member of the Florida Bar and notwithstanding that Florida has appropriate rules which allow for the institution of a contempt proceeding for the unlicensed practice of law.

6. That the abuse of civil rights as protected by the Constitution and the Bill of Rights in this cause are substantial. There is a lack of notice, a lack of disclosure and a lack of fair play. The principals of justice make a strong argument for this Court to consider the issues raised in this case.

7. A decision in this case is necessary due to its importance in terms of State Court regulation of its Bar Association and regulation of its members and non-members thereof.

8. Finally, there are significant issues relative to the impropriety of the Referee and the prosecutor for the Florida Bar who have employed methods which are not only unethical but violated the rules of fair play, the Constitutional right to due process, and the right to trial by an impartial trier of fact.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated March 1, 1999

APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

No. 87,035

THE FLORIDA BAR,
Complainant,

vs.

MICHAEL HARRIS WEISSER,
Respondent.

[May 14, 1998]

PER CURIAM.

We have for review the report of the referee recommending that Michael H. Weisser, who previously resigned from The Florida Bar in light of pending disciplinary allegations, be disbarred without leave to apply for readmission for ten years for later engaging in the unlicensed practice of law. We have jurisdiction. *See* Art. V, § 15, Fla. Const.

On December 18, 1995, the Bar filed a petition for order to show cause against Weisser alleging that he had engaged in the unlicensed practice of law in violation of this Court's order dated May 9, 1991.[1] This Court issued an order to show cause. In his amended response to the order to show cause, Weisser admitted representing his

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[1] The May 9, 1991, order granted Weisser's uncontested petition for resignation from the Bar without leave to apply for readmission for three and one-half years effective retroactive to July 8, 1988.

son in a legal matter against Kemper Insurance Company arising from unreimbursed property damage as a result of an automobile accident in which his son was involved. Weisser asserted, however, that such representation did not amount to the practice of law. After receiving several additional responses and replies filed by the Bar and Weisser, this Court referred the matter to a referee. The referee conducted a hearing on September 17, 1996, and filed a report on November 14, 1996, in which he found the following facts to be established by clear and convincing evidence.

In October 1992, Weisser filed suit against Kemper in county court in Dade County on behalf of his eighteen-year-old son. The referee found that Weisser's son was neither a minor nor unemancipated when Weisser filed suit on his behalf, and that Weisser materially misrepresented to the contrary in the county court and Bar disciplinary proceedings.

During the county court proceedings, which spanned over two and one-half years, Weisser prepared, signed, and filed numerous documents in a representative capacity for his son. He also prepared, signed, and filed several documents specifically indicating that he was an attorney, including two deposition notices containing the phrase "the undersigned attorneys," a "Motion for Sanctions and Attorney's Fees," and a notice setting a hearing on such motion. In addition, Weisser failed to advise opposing counsel that he was not a licensed Florida attorney after being notified in writing on two separate occasions that opposing counsel believed he was an attorney. Finally,

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[2] Although the referee filed his report on November 14, 1996, this appeal was not perfected until January 8, 1998. Weisser's original counsel withdrew representation shortly after the September 17, 1996, hearing, and his new counsel did not file a notice of appearance in this Court until September 18, 1997. Between those times, Weisser made numerous *pro se* filings which, combined with the various extensions of time granted to both Weisser and the Bar, contributed to the lengthy delay in these proceedings.

Weisser failed to advise the county court judge that he was not a licensed Florida attorney despite receiving an order from the judge that evidenced his belief that Weisser was acting as an attorney. The referee found Weisser's testimony, that he did not receive or did not remember receiving the court's order, to be untruthful.

Based on the above factual findings, the referee concluded that Weisser "intentionally and contemptuously" engaged in the unlicensed practice of law. The referee rejected Weisser's assertions that, if anything, he was merely negligent in practicing law, finding such assertions illustrated Weisser's failure to acknowledge the wrongful nature of his misconduct. The referee recommended that Weisser be found in willful contempt of this Court's May 9, 1991, order.

As to discipline, the refree recommended that Weisser be disbarred without leave to apply for readmission for ten years from the date of this Court's ruling in these proceedings. In recommending such discipline, the referee found that Weisser's intentional misconduct caused harm to the legal system and the profession, and that Weisser previously had been disciplined for the same or similar misconduct.[3] The referee also considered the following as

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[3] In 1988, this Court suspended Weisser for six months because he neglected a legal matter and engaged in conduct adversely reflecting on his fitness to practice law. *See Florida Bar v. Weisser*, 526 So. 2d 63, 64-65 (Fla. 1988). Specifically, a judgment in excess of $30,000 was entered against Weisser's clients because Weisser failed to appear at a calendar call and at trial, and Weisser demanded payment of attorney's fees before proceeding with the appeal to overturn the judgment. *See id.* The appeal was dismissed when the clients refused to pay, and this Court stated the following in imposing the six-month suspension.

> Respondent's acts were not the result of negligence. They were intentional, and the consequences of his acts were clearly predictable and to the client's detriment. It is unconscionable for an attorney to insist on payment of a fee to extricate a client

aggravating factors: (1) Weisser's untruthful testimony concerning whether his son was an unemancipated minor and whether he received the judge's order in the county court proceedings; (2) Weisser's failure to acknowledge the wrongful nature of his conduct; and (3) Weisser's substantial experience in the practice of law. In mitigation, the referee found that Weisser did not have a dishonest or selfish motive in representing his son, and stated that he was "fully aware that the Respondent was representing his son and did not receive remuneration for the representation. I have taken this into account [in] the proposed discipline."

Weisser now petitions this Court for review, challenging the referee's findings regarding guilt, specifically the issue of intent, and the referee's recommendation as to discipline. Weiser argues that his case should be controlled by *Florida Bar v. Neckman*, 616 So. 2d 31, 32 (Fla. 1993), where this Court publicly reprimanded the respondent for practicing law after resigning from the Bar. The Bar requests that we approve the referee's report.

A referee's findings regarding guilt are presumed correct and will be upheld unless clearly erroneous or without support in the record.. *See, e.g., Florida Bar v. Hughes*, 697 So. 2d 501, 503 (Fla. 1997). We approve the ref-

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from the adverse position which the attorney's acts caused in the first instance.

Id. at 65.

Also, in January 1990, this Court issued an order commanding Weisser to immedtaiely cease practicing law until he was reinstated to the Bar, stating that "[a]lthough respondent will not be held in contempt in this case, his conduct in this matter will be considered in reinstatement proceedings." *See Florida Bar v. Weisser*, No. 74,986 (unpublished order issued January 22, 1990). Furthermore, in *Florida Bar v. Weisser*, 581 So. 2d 1311 (Fla. 1991) (issued May 9, 1991), this Court granted Weisser's petition for resignation from the Bar, which was entered in light of pending allegations that he had violated the six-month suspension and the cease and desist order.

eree's findings because they are supported by substantial competent evidence. Weisser asserts that his misconduct in this case resulted from negligence rather than intentional misconduct. We disagree..

The record reveals that Weisser represented his son in the county court proceedings for over two and one-half years, during which he filed numerous documents implying that he was a licensed Florida attorney. The record also contains an order from the county court judge listing Weisser as "Esq." and an affidavit from opposing counsel stating that Weisser held himself out as an attorney in the county court proceedings. The referee considered Weisser's attempt to explain his conduct and rebut any implication that he acted or held himself out as an attorney, but the referee rejected Weisser's position and specifically found several portions of his testimony to be untruthful. The referee was in the best position to assess Weisser's character and credibility, and we therefore refrain from reweighing the evidence and substituting our judgment for that of the referee.. *See, e.g., Florida Bar v. Lecznar,* 690 So. 2d 1284, 1287 (Fla. 1997).

Turing to the issue of discipline, we emphasize that although a referee's recommendation as to discipline is persuasive, it is this Court's ultimate responsibility to impose an appropriate sanction. *See, e.g., Florida Bar v. Reed,* 644 So. 2d 1355, 1357 (Fla. 1994). However, as we stated in *Lecznar,* regarding the recommended discipline, the referee

> occupies a favored vantage point for assessing key consideration such as a respondent's degree of culpability and his or her cooperation, forthrightness, remorse, and rehabilitation (or potential for rehabilitation). Accordingly, we will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw.

690 So. 2d at 1288. In the present case, the referee recommended that Weisser be disbarred without leave to apply for readmission for ten years from the date of this Court's ruling in these poceedings. Weisser argues that any disbarment is excessive and that a public reprimand is more appropriate pursuant to this Court's decision in *Neckman*. In considering the totality of the circumstances and the referee's observations and recommendations, we find that disbarment is warranted. However, as explained below, we disagree with the referee's recommendation as to the length of disbarment.

In *Florida Bar v. Brown*, 635 So. 2d 13, 13-14 (Fla. 1994), we found an individual to be in contempt of this Court and disbarred him for practicing law after resigning from the Bar in light of disciplinary allegations. In doing so, we held that a "[c]lear violation of any order or disciplinary status that denies an attorney the license to practice law generally is punishable by disbarment, absent strong extenuating factors." *Id.* In *Florida Bar v. Bauman*, 558 So. 2d 994, 994 (Fla. 1990), we disbarred an attorney for practicing law during his six-month suspension, stating that "[w]e can think of no person less likely to be rehabilitated than someone like respondent, who wilfully, deliberately, and continuously, refuses to abide by an order of this Court." These cases are consistent with Florida Standard for Imposing Lawyer Sanction 8.1, which provides that disbarment is appropriate where an individual

> (a) intentionally violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system, or the profession, or
>
> (b) has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct

In the present case, it is clear that Weisser intentionally violated this Court's order granting his resignation from the

Bar by initiating litigation and engaging in extensive legal representation for over two and one-half years, and this misconduct caused injury to the legal system and the profession. In addition, Weisser previously has been disciplined for similar acts of misconduct, as this Court suspended him in 1988 for "intentional" and 'unconscionable" misconduct, *see Florida Bar v. Weisser*, 526 So.. 2d 63, 64-65 (Fla. 1988), issued an order in 1990 commanding him to cease practicing law until reinstated to the Bar, *see Florida Bar v. Weisser*, No. 74-986 (Fla. Jan. 22, 1990) (unpublished order), and granted his petition for resignation in 1991 which was entered while disciplinary allegations were pending against him.[4] *See Florida Bar v. Weisser*, 581 So. 2d 1311 (Fla. 1991). Thus, disbarment is an appropriate sanction in the present case pursuant to *Brown*, *Bauman*, and standard 8.1.

Furthermore, contrary to Weisser's assertions, this Court's decision in *Neckman* actually supports disbarment in this case. In *Neckman*, the respondent resigned from the Bar in light of disciplinary allegations and later held himself out as a licensed attorney in a single matter on behalf of his friends. *See* 616 So. 2d at 32. In analyzing the appropriate discipline in *Neckman*, we stated that '[d]isbarment would be appropirate where the violation

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[4] The referee correctly found that Weisser's 1991 resignation from the Bar, entered pursuant to Rule Regulating The Florida Bar 3-7, 12, was a "disciplinary resignation." Although the 1991 version of rule 3-7, 12 did not label such a resignation a "disciplinary resignation," *see id.*; *see also Florida Bar re Amendments to Rules Regulating The Florida Bar*, 621 So. 2d 1032, 1043 (Fla. 1993) (adding term "disciplinary"), Weisser was still required to apply for readmission under the same procedures as subsequent versions of the rule which did, and still do, characterize such a resignation as "disciplinary." *See id.* Therefore, Weisser's resignation was "disciplinary" in nature. *Cf. Florida Bar v. Segal*, 663 So. 2d 618, 621 (Fla. 1995) (finding attorney's 1994 attempt to voluntarily resign was a "nullity" because "[t]he only resignation available to an attorney faced with allegations of a discipinary violation is a 'disciplinary resignation' under rule 3-7, 12.").

results in injury or is an intentional repetition of prior misconduct for which discipline has been imposed." *Id.* (citing Fla. Stds. Imposing Law Sancs. 8.1). However, we found that disbarment would not be appropriate in *Neckman* because the referee's findings did not establish that the respondent's misconduct violated either prong of standard 8.1, and the mitigating factors found by the referee necessitated a sanction less severe than disbarment.

Specifically, the referee in *Neckman* found in mitigation that (1) there was no injury caused by the respondent's misconduct; (2) the respondent was motivated by a desire to help friends, not by financial gain; (3) the respondent's misconduct was unrelated to his prior misconduct; and (4) the respondent's rehabilitation and treatment under the supervision of the Florida Lawyer's Assistance (FLA) program was progressing rapidly. *See id.* Based on the referee's findings, we concluded that the appropriate discipline was a public reprimand coupled with probation, community service in the field of addictive diseases, and continuing counseling and treatment under the direction of FLA.

Conversely, in the present case, disbarment is appropriate based on our statement in *Neckman* that such discipline is proper "where the violation results in injury or is an intentional repetition of prior misconduct for which discipline has been imposed." 616 So. 2d at 32 (citing standard 8.1). As discussed above. Weisser's intentional misconduct caused injury to the legal system and the profession, and he previously has been disciplined for the same or similar misconduct. In addition, the only common mitigating factor present in this case and in *Neckman* is the abesnce of a dishonest or selfish motive, *see* Florida Standard for Imposing Lawyer Sanction 9.32(b), while there are serious aggravating factors in this case which were not present in *Neckman*.

Specifically, in this case, Weisser failed to acknowledge the wrongful nature of his conduct, *see id.* at 9.22(g),

and he presented untruthful testimony concerning whether his son was an unemancipated minor and whether he received the judge's order in the county court proceedings. *See id.* at 9.22(f). These aggravating factors, combined with Weisser's substantial experience in the practice of law, *see id.* at 9.22(i), further support the imposition of disbarment in this case. *See id.* at 9.21 (providing that aggravating factors "may justify an increase in the degree of discipline to be imposed").

At the same time, however, a ten-year disbarment would be excessive in light of that sanction being imposed in other cases involving more egregious misconduct. In *Florida Bar v. Lechtner*, 666 So. 2d 892, 894 (Fla. 1996), this Court disbarred an attorney without leave to apply for readmission for ten years where the attorney had been convicted of racketeering, bribing judges, and four counts of mail fraud. In *Florida Bar v. de la Puente*, 658 So. 2d 65, 70 (Fla. 1995), this Court imposed a ten-year disbarment for misappropriaiton of client funds, forgery, misrepresentations to probate court, fabricating evidence pertinent to the disciplinary proceedings, and encouraging witnesses to lie. In *Florida Bar v. Davis*, 657 So. 2d 1135, 1137 (Fla. 1995), this Court disbarred a judge for ten years where the judge accepted bribes and committed other acts of misconduct. Finally, in *Florida Bar v. Dykes*, 513 So. 2d 1055, 1056 (Fla. 1987), this Court disbarred an attorney without leave to apply for readmission for ten years where the attorney (1) failed to notify a client of his six-month suspension; (2) acted as personal representative of an estate after being suspended; (3) communicated with a client about pending legal business during his suspension; (4) misappropriated estate funds with the intent to convert the funds to his own use; and (5) willfully disregarded a court order to turn over estate assets to a successor personal representative.

These cases involved conduct more egregious than that exhibited by Weisser in the present case, and we there-

fore find that a five-year disbarment effective retroactive to November 14, 1996—the date the referee's report was filed—is the appropriate sanction in this case. *See Florida Bar v. Kaufman*, 684 So. 2d 806, 810 (Fla. 1996) (agreeing with recommended disbarment but reducing term from ten to five years). Such a disciplinary measure is fair to society, fair to Weisser, and severe enough to deter others from engaging in similar misconduct. *See, e.g., Florida Bar v. Lawless*, 640 So. 2d 1098, 1100 (Fla. 1994).

Accordingly, we find Michael H. Weisser in contempt of this Court and hereby disbar him without leave to apply for readmission for a period of five years in accordance with rule 3-5.1(f) of the Rules Regulating The Florida Bar. This disbarment shall be effective retroactive to November 14, 1996, the date the referee's report was entered in this case. Judgment for costs in the amount of $3,443.18 is hereby entered against Weisser, for which sum let execution issue.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, HARDING, WELLS, ANSTEAD and PARIENTE, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARMENT.

APPENDIX B

SUPREME COURT OF FLORIDA

Thursday, December 3, 1998

Case No. 87,035

THE FLORIDA BAR,
Complainant,

v.

MICHAEL HARRIS WEISSER,
Respondent.

The Motion for Rehearing and Motion for Reconsideration are hereby denied.

HARDING, C.J., and OVERTON, SHAW, KOGAN, WELLS, ANSTEAD and PARIENTE, JJ., concur.

A True Copy

TEST

/s/ Sid J. White
Clerk, Supreme Court

TC

cc: Mr. John F. Harkness, Jr.
Mr. John A. Boggs
Mr. Paul A. Remillard
Mr. Billy J. Hendrix
Mr. Michael Harris Weisser
Mr. Richard B. Marx
Hon. Arthur H. Taylor, Referee

APPENDIX C

SUPREME COURT OF FLORIDA

Thursday, May 9, 1991

Case No. 77,746
TFB No. 91-71,103 (MRS-IIN)

THE FLORIDA BAR,
Complainant,
v.
MICHAEL HARRIS WEISSER,
Respondent.

The uncontested petition for resignation with leave to apply for readmission after a period of three and one-half (3½) years is approved effective retroactive to July 8, 1988.

Judgment for costs in the amount of $74.43 is taxed against respondent for which sum let execution issue.

Not final until time expires to file motion for rehearing and, if filed, determined. *The filing of a motion for rehearing shall not alter the effective date of this resignation.*

A Trule Copy
TEST

/s/ Sid J. White
Clerk, Supreme Court

TC

cc: Jacquelyn P. Needelman, Esquire
John A. Boggs, Esquire
Michael H. Weisser, Esquire